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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re ASHLEY M., a Person Coming  
Under the Juvenile Court Law.

B195010

(Los Angeles County  
Super. Ct. No. CK58207)

LOS ANGELES COUNTY DEPARTMENT  
OF CHILDREN AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

EDMUND M.,

Defendant and Appellant.

APPEAL from an order of the Superior Court of Los Angeles County, Stephen Marpet, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.)  
Reversed and remanded with directions.

Andre F. F. Toscano, under appointment by the Court of Appeal, for  
Defendant and Appellant.

Raymond G. Fortner, Jr., County Counsel, Larry Cory, Assistant County  
Counsel, and Fred Klink, Senior Deputy County Counsel, for Plaintiff and  
Respondent.

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Before the dependency court terminates a presumed father's parental rights, the court must find by clear and convincing evidence that the presumed father is unfit. Because no such finding was made in this case (indeed, the court struck the only allegation concerning the father's unfitness), we reverse an order terminating the presumed father's parental rights.

### **FACTS**

Mandy S. has three children who have three different fathers -- Angel P., born in March 1998, whose father is Angel P., Sr.; Ashley M., born in October 2000, whose father is Edmund M.; and Amber G., born in February 2005, whose father is Carlos G. Ashley and Edmund are the only parties to this appeal.

The children came to the attention of the Department of Children and Family Services when Amber was born, at which time mother and child tested positive for amphetamines. In March 2005, a petition was filed alleging that Mandy had a history of drug abuse and was incapable of caring for the children. (Welf. & Inst. Code, § 300.)<sup>1</sup> There were no allegations about any of the fathers, but the detention report identified them, reported that they had not been located, and informed the court that Angel and Ashley were living with Patricia M., Edmund's mother (and Ashley's grandmother). The children were detained and placed with Patricia.

The Department reported in April that Edmund had been located and interviewed. He had worked steadily for 17 years and was then employed by an

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<sup>1</sup> All section references are to the Welfare and Institutions Code.

insurance company and enrolled in a paralegal program at a community college. He and Mandy had lived with Patricia from 1998 to 2002, but he had moved out when Patricia obtained a restraining order against him (purportedly because Edmund refused to pay more rent, although the record suggests there may have been some other issues).<sup>2</sup> Mandy and the children remained in Patricia's home, where Edmund visited Ashley weekly at first but then stopped, and he had not visited her for about 18 months. According to Edmund, Patricia had initiated guardianship proceedings in late 2004, and the court had authorized unmonitored visits shortly before the Department entered the picture.

On April 18, 2005, the dependency court found that Edmund was Ashley's presumed father. Edmund's lawyer told the court about the guardianship court's visitation order and represented that Edmund was "ready, willing, and able" to provide full-time care for Ashley. The dependency court instructed the Department to "look into placing [Ashley] with [Edmund]" and authorized unmonitored visits.

On May 4, the Department filed an amended petition alleging that Edmund "has a history of criminal conduct including but not limited to convictions for battery and [driving under the influence], which is endangering to [Ashley's] physical and/or emotional health and safety and places [Ashley] at risk of physical and/or emotional harm. Further, such criminal conduct creates a detrimental environment for [Ashley]." On May 16, the dependency court found "there [was] just *nothing . . . to connect up these charges*" with the

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<sup>2</sup> According to the Department's report, Edmund had been arrested once in August 2001 and again in December 2001 on charges of inflicting corporal injury on a spouse or cohabitant, but the charges were dismissed in 2002 at which time Edmund was convicted of an unidentified misdemeanor. In 2004, Edmund was convicted of misdemeanor driving under the influence.

allegations that Edmund posed a risk of harm to Ashley, and ***struck those allegations from the amended petition*** -- leaving no allegations at all about Edmund. (Emphasis added.) The court nevertheless ordered Edmund to participate in a parenting program and individual counseling, ordered random drug testing, and confirmed Edmund's right to unmonitored visits with Ashley.

In August, the Department reported that Edmund had earlier completed a domestic violence and anger management program, and that he had started individual counseling but had not yet enrolled in a parenting program. He had eight negative drug tests and one missed test. Edmund was visiting Ashley on Sundays with mixed results. He missed one visit in June, and another in July. In December, the Department filed a section 387 petition and obtained an order removing all three children from Patricia's home because Patricia was no longer willing to care for them. The children were placed in foster homes.

In May 2006, the Department reported that Ashley and Angel had been placed with Jerry and Shannon J., and that Amber had been placed with another family. At a May 2 hearing, Edmund's lawyer told the court Edmund had completed his individual counseling and drug testing programs but not the parenting program, that Ashley had been placed in Santa Clarita, very far away from Edmund's San Gabriel Valley residence, that it was difficult for him to visit, and that Edmund wanted to have Ashley placed with him. A contested hearing was set for June 7.

In June, the Department reported that Edmund had not been visiting Ashley and recommended termination of Edmund's reunification services. This report was received in evidence at the June 7 hearing but no testimony was

presented. At the end of the hearing, the court found by a preponderance of the evidence that there was no likelihood that Mandy would reunite with the children and, based on that finding, terminated reunification services for both Mandy and Edmund. Although no other findings are reflected in the reporter's transcript, the court's minute order recites that Ashley's return "to either of the parents" would likely result in either severe emotional or severe physical harm to Ashley, that the "father FATHER(S) [sic] is in partial compliance with the case plan," and that reasonable services had been provided. A permanent plan hearing was scheduled.

In October, the Department reported that all three children had been placed with a prospective adoptive couple and that the children were adjusting well to their new home. At a permanent plan hearing held on October 6, Edmund objected to Ashley's adoption, arguing that he had a strong parental bond with her and that adoption was not in her best interests. The dependency court nevertheless found that it was likely that Ashley and the other children would be adopted, and terminated Edmund's parental rights.

## DISCUSSION

Edmund contends the order terminating his parental rights cannot stand because it was entered without a finding, by clear and convincing evidence or otherwise, that he is unfit to be Ashley's father, thereby violating his right to due process. For the reasons explained in *In re Gladys L.* (2006) 141 Cal.App.4th 845, we agree.<sup>3</sup>

"Parents have a fundamental interest in the care, companionship, and custody of their children. (*Santosky v. Kramer* (1982) 455 U.S. 745, 758 . . . .) *Santosky* establishes minimal due process requirements in the context of state dependency proceedings. 'Before a State may sever completely and irrevocably the rights of parents in their natural child, due process requires that the State support its allegations by at least clear and convincing evidence.' (*Id.* at pp. 747-748.) 'After the State has established parental unfitness at that initial proceeding, the court may assume at the *dispositional* stage that the interests of the child and the natural parents do diverge.' (*Id.* at p. 760.) 'But until the State

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<sup>3</sup> We reject the Department's contention that the issue was waived because Edmund did not object to the court's dispositional orders at the time it struck the allegations against him (in May 2005). (*In re Gladys L.*, *supra*, 141 Cal.App.4th at p. 849 [the forfeiture rule will not be enforced when its application would conflict with due process, and although the reversal of the termination order undermines the important goal of rapidly concluding dependency proceedings, it is the only way to safeguard the father's rights as the child's presumed father and ensure that he is afforded due process]; *In re Laura H.* (1992) 8 Cal.App.4th 1689, 1695, fn. 7 [a party's silence, if attributable to ignorance or confusion, cannot be construed as a waiver of a fundamental constitutional right]; *In re S.B.* (2004) 32 Cal.4th 1287, 1293-1294 [because dependency proceedings involve the well being of children, a reviewing court has discretion to consider a challenge to a ruling even where the point was not preserved below].) More to the point, we do not see the benefit of a rule that would require a parent to seek appellate review when the only allegations against him have been stricken by the dependency court, and the only problem was that the dependency court was focusing on reunification services directed at problems Edmund never had or were no longer at issue.

proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of their natural relationship.' (*Ibid.*)

"California's dependency system comports with *Santosky's* requirements because, by the time parental rights are terminated at a section 366.26 hearing, the juvenile court *must* have made prior findings that the parent was unfit. (*Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242, 254 . . . .) 'The number and quality of the judicial findings that are necessary preconditions to termination convey very powerfully to the fact finder the subjective certainty about parental unfitness and detriment required before the court may even consider ending the relationship between natural parent and child.' (*Id.* at p. 256.) The linchpin to the constitutionality of the section 366.26 hearing is that prior determinations ensure 'the evidence of detriment is already so clear and convincing that more cannot be required without prejudice to the interests of the adoptable child, with which the state must align itself.' (*Ibid.*)" (*In re Gladys L., supra*, 141 Cal.App.4th at p. 848.)

Here, as in *Gladys L.*, the requirements of *Santosky* and the safeguards embedded in the California dependency scheme were ignored. Although the Department alleged that Edmund was unfit because of his prior criminal record, the dependency court expressly found that he was not and struck that allegation, and no other unfitness allegations were ever asserted against him. For this reason, due process prohibits the termination of Edmund's parental rights. (*In re Gladys L., supra*, 141 Cal.App.4th at p. 848.)

As did the court in *Gladys L.*, we decline the Department's invitation to imply a finding of detriment -- because to do so we would have to act both as the charging entity and the fact finder, which would serve only to deny Edmund an opportunity for notice of the specific charge of unfitness and an opportunity to respond to that charge. (*In re Gladys L., supra*, 141 Cal.App.4th at pp. 848-849.) It is up to the Department to charge unfitness if there is a factual basis for such an allegation.



**DISPOSITION**

The October 6, 2006 order terminating Edmund M.'s parental rights over Ashley M. is reversed, and the cause is remanded to the dependency court with directions to determine whether Edmund M. is fit to be Ashley's father and to thereafter make such other orders as are necessary and appropriate.

NOT TO BE PUBLISHED.

VOGEL, J.

We concur:

MALLANO, Acting P.J.

JACKSON, J.\*

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\*Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.